

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7236

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNICE GILBERT,

*Plaintiff-Appellant-
Cross-Appellee,*

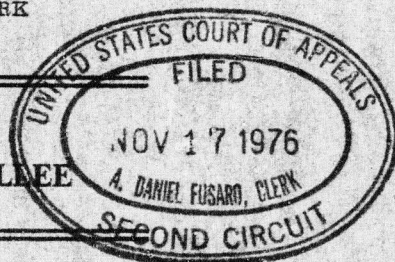
v.

CONSOLIDATED FOODS CORPORATION,

*Defendant-Appellee-
Cross-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON CROSS-APPEAL FOR
PLAINTIFF-APPELLANT-CROSS-APPELLEE



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TABLE OF CONTENTS

	<u>Page</u>
Counter Statement of the Issues Presented for Review . . .	1
Statement of the Case	4
Argument	
POINT I -	
Having Concluded That Plaintiff Is Not Entitled To Recover Under The Written Contract, the Court's Granting of Relief In Quantum Meruit Was Proper	23
POINT II -	
The Amount of The Award Was Inadequate And Should Not Be Reduced	31
Conclusion	36

TABLE OF AUTHORITIES

Cases:	Page
Atwater v. North American Coal Corp., (2nd Cir.1940) 111 F. 2d 125	25
Bialostok v. Wolfer, 191 Misc. 385, 77 N.Y.S.2d 222 (1947).....	24
Grattan v. Societa Azzioni Cotonificio Cantoni, 151 N.Y.S. 2d 875 (1956)	23
Hamill v. Maryland Cas. Co. (10th Cir. 1954) 209 F.2d 338	26
Hampton Roads Carriers v. Boston Ins. Co., (D. Md. 1957) 150 F.Supp. 338	26
McCulloch Motors Corp. v. Oregon Chain Saw Corp., (S.D. Cal.1965) 245 F.Supp.851, 9 F.R.Serv. 2d 16.32, Case 2	25
Michael Del Balso, Inc. v. Carozza (App.D.C. 1943) 136 F. 2d 280	25
Rodger v. Emigrant Industrial Sav.Bank 258 App.Div. 614, 17 N.Y.S. 2d 530 (1940)	24
Underwriters Salvage Co. of New York v. Davis & Shaw Furniture Co. (10th Cir.1952) 198 F.2d 450, 17 F.R. Serv. 15 b.1, Case 1	26
Statutes and Rules:	
Federal Rules of Civil Procedure	
Rule 15 (b).....	24, 25
Rule 54 (c)	25
Miscellaneous:	
Annotation, Recovery on Quantum Meruit Where Only Express Contract is Pleaded 84 ALR 2d 1077....	26

UNITED STATES COURT OF APPEALS

For The Second Circuit

ANNICE GILBERT,

Plaintiff-Appellant-Cross-Appellee,

v.

CONSOLIDATED FOODS CORPORATION,

Defendant-Appellee-Cross-Appellant.

On Appeal From The United States District Court For The Southern
District of New York

BRIEF ON CROSS - APPEAL FOR
PLAINTIFF -CROSS APPELLEE

COUNTER STATEMENT OF THE
ISSUES PRESENTED FOR REVIEW.

I. Where the District Court denied plaintiff the relief she requested in her complaint on the grounds of the unenforceability of the written contract under which she sued, and where the record reflects that the parties fully litigated factual issues regarding the plaintiff's right to compensation for advisory services rendered to defendant in connection with that contract, and further litigated the issue of the value of those services, did the

District Court properly grant plaintiff recovery for those services on a quantum meruit basis, even though the complaint was not amended to include a request for that relief?

II. Where the record reflects substantial evidence that plaintiff advised defendant that she would only disclose business ideas regarding a glove to be manufactured and sold by defendant if defendant would sign an agreement providing for compensation, that such an agreement was signed by defendant, that defendant solicited and often used plaintiff's advice regarding the promotion and advertising of the glove to which the written agreement related, that such advice was given by plaintiff over a period of 18 months in reliance on the written contract, and in circumstances where plaintiff had a right to rely upon the expectation of being paid, that defendant's president continually assured plaintiff that he would be "fair" to plaintiff, and where said written contract was held unenforceable, is the decision of the District Court granting to plaintiff the reasonable value of her services clearly erroneous?

III. Where the District Court specified with particularity the basis upon which it determined the amount of an award for the reasonable value of plaintiff's advisory services, and relied upon factors which are supported by substantial evidence, including evidence of the nature and extent of those services as well as expert testimony as to their value, should the award be set aside as clearly erroneous ?

STATEMENT OF THE CASE

An understanding of the issues raised on the cross-appeal requires a more extended review of the evidence and issues presented to the District Court than is contained in the cross-appellant's brief. Indeed, cross-appellant (hereinafter "Defendant" or "Aris"), presenting a simplified account, implies that the District Court erroneously rendered a judgment for cross-appellee (hereinafter "Plaintiff" or "Mrs. Gilbert") by resolving issues which neither of the parties conceived were before the Court. This is simply not the case.

The trial on liability took eight days, and the trial on damages one day. The transcript exceeds 1200 pages. Voluminous exhibits were submitted by both sides. For the purpose of putting the present contentions of defendant in their proper perspective, this Court should be aware of all of the issues which were presented to the District Court since it will then be apparent that the award of the District Court, while it is woefully inadequate from plaintiff's standpoint, is clearly sustainable by the record. The suggestion by defendant that it was "surprised by the quantum meruit award" and that it was prejudiced by the Court's resolution of an issue

which it did not know was being tried are frivolous contentions, made in an effort to deprive plaintiff of even the limited award which she has been granted.

The thrust of plaintiff's case was that she gave to the defendant certain ideas and business suggestions regarding the manufacture and marketing of a glove out of a lycra spandex material, which glove would have the effect and could be advertised as having the effect of massaging the hands and thus creating beneficial cosmetic and therapeutic effects upon the wearer of the glove. Plaintiff contended that she was entitled to compensation pursuant to a written agreement, dated March 30, 1968, which had been prepared by her husband, who is not a lawyer, during a dinner meeting, which she claimed was signed by Lari Stanton, the President of Aris Gloves. While defendant acknowledged that he signed that agreement, a basic issue was presented to the District Court as to what idea plaintiff disclosed on March 30th. As defendant points out in its brief Stanton claimed that it was on that date, after he signed a writing similar to the March 30, 1968 document, * that Mrs. Gilbert gave

* Stanton claimed that on March 30, he signed an agreement written on the back of a cocktail napkin and that the March 30th document produced by plaintiff was signed by him a number of days after the idea was given to him (Tr. L. 13-14). Parenthetical numbered references preceded by "Tr. L." are to pages of the transcript of the trial on liability, which transcript is contained in the original Record. References followed by "a" are to pages in the Appendix filed by the defendant.

him an idea to manufacture a " night mitten " to be worn by a woman at night, which would not cover the fingers , which would compress veins on the hand through the use of a " power net " material which would massage a cosmetic cream into the skin,(Tr. L.13-17,19,267). Stanton denied that plaintiff suggested that the night mitten or any other glove would benefit the hands in any other way except to compress veins (Tr. L.20). The District Court rejected Stanton's version and accepted Mrs. Gilbert's testimony to the effect that it was prior to March 30, 1968 that she gave Stanton the idea to manufacture a " night mitten " (10a-11a). The District Court found that on March 30, after Stanton signed the agreement, plaintiff revealed her idea which was, so the Court found, that defendant should manufacture fashion gloves from a lycra spandex material of the kind then used in women's girdles, which " could be advertised to benefit the hands of the wearer cosmetically and therapeutically by creating a massaging action on the hands, depressing and flattening veins, increasing blood circulation and keeping the skin smooth, white and flat " (12a, Tr. L. 392). Plaintiff supplied Stanton with a piece of the material, cut out of her girdle (Tr. L.388-395, Exh. 3).

As the District Court decision reflects, Aris embarked upon considerable activity subsequent to March 30, 1968, including ordering substantial

quantities of lycra spandex material, experimenting with the material for use in a fashion glove, and developing a major advertising and marketing campaign, including television as well as other media, the thrust of which was that the glove, which was called " Hands Beautiful " and " Isotoner" , would benefit the hands of the consumer in the manner suggested by plaintiff. Stanton described the advertising and marketing campaign as having introduced a " completely new concept " in the glove (Tr. L. 364, 263) industry. / Defendant commenced selling the glove in September 1969 (16a-18a). The record reflects that by June 30, 1975 the defendant had gross sales of the gloves of approximately \$17,000,000.00 , having grossed in excess of \$1,000,000.00 in its first full year, and had expended annual amounts ranging from \$200,000.00 to \$800,000.00 on advertising the glove and its claimed beneficial effects (Tr.L. 9-10, 645 , see also samples of advertising material comprised in Exhs. 5-13).

In addition to concluding that Mrs. Gilbert was being truthful and that Mr. Stanton was not being truthful as to the substance of the idea given by Mrs. Gilbert on March 30, 1968, the Court further found that:

"Stanton had not at the March 30th meeting or thereafter ever disparaged Mrs. Gilbert's idea or its originality." (13a, emphasis supplied)

Mrs. Gilbert argued below, with considerable force, that if the idea was

not novel to Stanton, he would have disparaged it at the time that the Court found it was given to him on March 30th and he would not have signed the March 30, 1968 agreement a f t e r he had been given the idea, Stanton having testified that two days after the idea had been given to him, he signed the copy of the agreement which Mrs. Gilbert produced at trial and formed the basis of her complaint (Tr. L. 13-16, 301). It was further argued on behalf of Mrs. Gilbert that Stanton would have "disparaged" the originality of the idea in May 1968 and again in October 1968 when he was presented with two draft agreements providing for a royalty for plaintiff and stating that she was the originator of the idea for the Hands Beautiful glove (Exhibits 91 & 92). Further, it was argued by plaintiff, had the idea not been novel to Stanton and valuable to him, he would have so stated at the meeting of April 1970 when Stanton offered Mrs. Gilbert \$9,000.00 (Tr. L. 208-~~12~~ or at other times that the Court found that

"He (Stanton) constantly told Mrs. Gilbert that Aris was developing the manufacture and promotion of lycra spandex gloves and that 'I will always be fair to you. Don't worry.' " (13a, Tr. L. 79)

The District Court also had before it the testimony of Stanton regarding the drawing up of a formal agreement. Stanton recalled telling Mrs. Gilbert to "have your attorney draw up a contract" (Tr. L. 181) and after telling her that the first contract was not acceptable that he "might have "

told plaintiff that his lawyers were looking over the agreement she had sent to him on October 1968 and he " might have " told her on more than one occasion " to get her off my back " (Tr.L. 196-197). Moreover Stanton acknowledged that at the time that his company was being sold to Consolidated Foods, he told his lawyers that he " had a personal obligation to Mrs. Gilbert, that he would take care of privately " (Tr.L.197). Indeed Stanton admitted that he " might have " told a third party that plaintiff had something to do with originating the idea with the glove (Tr.L. 87-89).

Considerable testimony was elicited during the course of the trial with respect to the activities of Aris regarding the development and manufacture of the glove, and with respect to the development of the advertising and marketing program during the period March 30, 1968 to September 1969 when the glove was first sold. The Court found, based on considerable evidence, that during this period

"Stanton periodically discussed the glove with the Gilberts, sought their comments about its design (47, 48, 49, 96, 99, 425) and in general kept them informed about the product's progress (38, 532-3) more than once Stanton gave samples to Mr. Gilbert who then showed them to his wife (102). " (16a)

The Court further found that:

"During the period that Aris was developing its promotion materials, Stanton discussed its advertising ideas with the Gilberts on approximately 12 occasions. (45, 46, 169) Mr. Gilbert , and sometimes Mrs. Gilbert, advised Stanton at his request of their reactions

to promotion, advertising and packaging plans (69, 139, 166, 167). The Gilberts also attended press parties for promotion of the gloves and, at least, during one of them, helped Stanton by circulating among the guests to stir up interest (461, 561). Both Gilberts also suggested to Stanton possible names for the gloves (433, 499) which was marketed under the trade-names Isotoner and Hands Beautiful (33). "(17a-18a)

Plaintiff contended that she was entitled to 8% of Aris' sales of Hands Beautiful gloves, having testified that Stanton had agreed to pay her that (Tr. L. 403, 406). Alternatively, plaintiff requested the reasonable value of the ideas revealed to Stanton.

The District Court held that the March 30th agreement " fails to state the terms of compensation with the specificity required under New York Contract Law" (19a). It held that the claim for a royalty " fails because since its' payment would have extended beyond one year, it could not be enforced unless in writing, N.Y.Gen.Ob.Law, § 5-701 (1). " The Court then pointed out that a contractual commitment to pay a " reasonable return has been held, in similar instances, to be unenforceable for vagueness " (19a). The District Court then stated:

"However, as the court noted in Varney:

' In the case of a contract for the sale of goods or for hire without a fixed price or consideration being named, it will be presumed that a reasonable price or consideration is intended and the person who enters into a contract ... is liable... as on an implied contract. '

"In Varney , 217 N.Y. at 228, the court allowed recovery on quantum meruit by a party who had performed in reliance on the contract terms. Accord, Bialostok v. Wilson, 191 Misc. 385(1948) ; United Press v. N.Y. Press Co. , 164 N.Y. 406, 412 (1900). A similar recovery is appropriate here. That as of March 30, 1968 Mrs. Gilbert was no longer willing to give Stanton business suggestions for nothing is evident from her refusal to divulge her idea without a written agreement ; and that Stanton was willing to pay for her services is evidenced not only by his signing the March 30th document but also by his consistent reassurances that he would be "fair" to Mrs. Gilbert."

Concluding that plaintiff is not entitled to be compensated for the idea which the District Court found she gave to defendant on March 30, 1968, finding that the suggestion of the use of lycra spandex " was not novel to Stanton " (21a) in light of his dealings with a textile manufacturer " in the mid-60's " , * and in view of Stanton's receipt from Mr. Henry Cohen of a glove sample made out of lycra spandex prior to March 30, 1968. The Court further found that the development process of a glove made out of lycra spandex material was well underway by the time Mrs. Gilbert revealed her idea .

The Court further found that plaintiff could not recover for suggesting the advertising claims " ... for she herself admitted that she had disclosed these ideas to Stanton (in connection with the night mitten) before the March 30, 1968 dinner meeting and without demand or expectation of compensation (472). " (21a)

* Stanton testified these dealings were in 1962 or 1963 (Tr. L. 233) which is 5 or 6 years prior to the March 30th meeting with Mrs. Gilbert.

Plaintiff had argued below that the overwhelming weight of the evidence required a finding that Stanton had not been working on the Hands Beautiful concept prior to plaintiff's disclosure on March 30, 1968, and that Stanton was motivated to do so subsequent to that date by his acceptance of plaintiff's idea. Without reviewing all of that considerable testimony, this Court should note the following:

A. Mr. Cohen testified that Stanton, to whom he brought the lycra-spandex material in December of 1967 or January of 1968, "vacillated or hesitated or fooled around " for " several months ", or two or three months, before giving Cohen an answer as to whether or not he was interested in the material (Tr. L. 968, 987, 991). That testimony is highly significant in that three months from early January 1968, would be the end of March, 1968 or the beginning of April, 1968, being the time of the meeting with the Gilberts in the Right Bank Restaurant where the agreement was signed and the idea disclosed. It is a fair inference that Stanton was motivated to take an interest in the fabric that Cohen had shown him (if indeed that did occur) because it fit with Mrs. Gilbert's idea for a cosmetic glove made out of the Webco material which she found in her girdle.

B. Mr. Robbins, of Webco, testified that he had no dealings with Mr. Cohen or Mr. Stanton in early 1968, and that a search of Webco's re-

cords revealed no correspondence between any of those persons prior to March 30, 1968 (Tr. L. 921-923) ; that the first time that he knew of any interest on the part of Aris in obtaining an exclusive on the product was approximately 30 to 60 days prior to October 21, 1968 (the date of the letter granting the exclusive) (Tr. L. 927) ; that he had no memory of being aware of any interest on the part of Aris in their material prior to May of 1968, which is the earliest date that Webco records reflect any purchases by Aris (Tr. L. 930).

C. Stanton testified that it was " in 1962 or 1963 " , that Mr. Winkler had suggested to him that a fashion glove be made out of lycra-spandex and be marketed in a manner similar to Supp-Hose (Tr. L. 233-333). That was five or six years prior to the March 1968 meeting with Mrs. Gilbert. Upon Stanton's testimony then, he did nothing for five or six years to effectuate the idea Mr. Winkler had supposedly given him, despite the fact that Webco, whose material was eventually used in the Hands Beautiful glove, had been manufacturing that material since 1964, as the Court indicates at page "5" (14a) of its initial decision./ Indeed, the lycra material developed by Winkler in 1965 and 1966 was " reasonably close " to the Webco material which was eventually used in the glove, but Stanton did not use it or even seek to find suitable material from other manufacturers (Tr. L. 340 - 346).

D. No witness testified as to any activity or conversation even remotely related to the development of a marketing and advertising program

which included the making of cosmetic and therapeutic claims, prior to March 30, 1968, and after Cohen allegedly showed Stanton the Webco material in December of 1967.

E. The correspondence between Aris and Harvey Chandler (See 1st letter in Ex. 27), makes it perfectly clear that the first time that the subject was discussed with Chandler who was responsible for the advertising campaign, was in August 1968. In this connection, it should be noted that Mr. Stanton, in his extensive deposition given prior to trial, did not say that Winkler had given him the idea for the making of a glove which would be like a "Supp-Hose" for the hands, or any similar idea (Tr. L. 335-337).

F. Exhibit "28" is a trademark registration for "Hands Beautiful" and "Isotoner", on which the claim is made that the earliest use of those names was in July, 1968, four months after the meeting in the Right Bank Restaurant.

G. Stanton tried to get a patent on the Hands Beautiful glove in August 1968 (Tr. L. 204, 206) five months after the meeting in the restaurant.

H. Efforts to verify the medical claims were not made until well after March 30, 1968 (Ex. 112).

I. The Court found in its decision that Stanton had not at the March 30th meeting or thereafter ever disparaged Mrs. Gilbert's idea or

its originality (l3a) . While the idea may not have been " novel " within the meaning of the March 30th agreement, as the Court found, Stanton's failure to ever disparage its originality is an indication that he valued it because he then saw its merit and was motivated by it to embark upon a new activity.

J. As is previously pointed out, Stanton acknowledged that he told Mrs. Gilbert to have her attorney draw up a contract, and that after the first contract was not deemed acceptable by him that he suggested that a new contract be drawn. This testimony, when viewed in relation to the Court's finding as to the substance of the idea related on March 30, 1968 by Mrs. Gilbert to Mr. Stanton, reflects the expectation of both parties that Mrs. Gilbert should be compensated for her business advice and that their financial dealings would be on-going in that Mrs. Gilbert's compensation would be geared to the income to the income (or lack of it) from the product. Having a lawyer draw up a contract in this situation clearly contemplated a continuing relationship geared to income which in the minds of the parties needed memorializing in a written document. The Court should also note Mr. Stanton's admission that he " might have " told Mr. Cohen that Annice Gilbert had something to do with originating the glove (Tr. L. 87-89). Surely this indicates an acknowledgement on the part of Stanton that his decision to embark upon the marketing scheme for Hands Beautiful was motivated by

his acceptance of plaintiff's suggestion, whether it was " novel " or not.

K. The extensive involvement of Mrs. Gilbert in the development of the marketing and advertising program, which is reflected in the facts related in the hypothetical question put by plaintiff's attorney, as well as the extensive involvement of Mr. Gilbert, all of which was done without a specific agreement as to the amount of compensation, would indicate that Mrs. Gilbert was expecting to be paid in accordance with the success of the product.

L. Mr. Stanton testified that he signed the March 30, agreement, Exhibit "1", pursuant to which Mrs. Gilbert was to receive " a reasonable return ", after Mrs. Gilbert had given him the idea on March 30, 1968 (Tr.L. 301-302).

M. When Cohen allegedly showed the Webco material to Stanton in late 1967 or early 1968, Stanton did not discuss with Cohen any beneficial affects that the material could be claimed to have (Tr.L. 331-333). Clearly his intention to make such claims did not develop until Mrs. Gilbert " sparked " his interest.

With respect to the District Court's finding that Mrs. Gilbert is not entitled to the value of the advertising claims, because she " admitted that she disclosed these ideas to Stanton ... before the March 30, 1968 dinner meeting and without demand or expectation of compensation", the record of the trial contains no such admission by

Mrs. Gilbert. To the contrary, Mrs. Gilbert testified that it was her understanding prior to March 30, 1968 that

"He said whatever ideas he would utilize he would pay me for them. That was the understanding. " (Tr. L. 473)

Although the District Court held that defendant is not liable for the value of the specific ideas given to the defendant on March 30, 1968, it also held as follows:

" On the other hand, the defendant is liable to Mrs. Gilbert for her continual advice to Stanton throughout the development and the promotion of the glove, advice which Stanton solicited and often used, and which was given by Mrs. Gilbert in clear reliance on Stanton's March 30th promise to compensate her. While the March 30, 1968 agreement may be unenforceable, it is the strongest evidence that Mrs. Gilbert expected to be remunerated for any future business suggestions she made to Aris. Having solicited her services in circumstances in which she had a right to rely on the expectation of being paid, Stanton bound Aris and its successors to compensate her for their use. Implicit in all contracts, written or implied, is an implied covenant of fair dealing and good faith. Van Valkenburgh v. Hayden Pub. Co., 30 N. Y. 2d 34, 45 (1972) ; Gordon v. Nationwide Mut. Ins. Co. , 30 N. Y. 2d 427, 437 (1972). Stanton breached that covenant and under the circumstances, declining to award damages for such services would unjustly enrich the defendant at Mrs. Gilbert's expense, Underhill v. Schenck, 238 N. Y. 7, 13-15 (1924) (Cardozo, J.)

But while Stantons' conduct toward Mrs. Gilbert may not have been the most honorable, it in no way

approaches the degree of fraud and "high moral culpability " necessary to support a claim for punitive damages under New York law. Walker v. Sheldon, 10 N.Y.2d 401, 404-405, 223 N.Y.S. 2d 488 (1961) ; see also Caldwell v. New Jersey, 47 N.Y. 282, 296 (1872) ; Cleghorn v. N.Y. Cent. & H. R.R.R. 56 N.Y. 44, 48 (1874) ; Soucy v. Greyhound Corp. , 27 A.D. 2d 112, 113, 276 N.Y.S. 2d 173, 175 (3rd Dept. 1967) ; Noonan v. Luther, 119 App. Div. 701, 104 N.Y.S. 684 (3rd Dept. 1907).

For the reasons stated above, we find that the defendant is liable to Mrs. Gilbert for the reasonable value of her services in advising Aris in connection with the development and promotion of the "Hands Beautiful" and other " Isotoner" gloves, but the defendant is not liable otherwise.

The Court will fix a date for trial as to damages. "
(22a-23a)

After the rendition of the District Court decision on liability, plaintiff moved to amend the findings of fact and conclusions of law, principally on the grounds that even if every part of plaintiff's idea was not new, she should be compensated for it on the ground that the idea as a package was valuable to Stanton, in that it sparked defendant's efforts to begin manufacturing the Hands Beautiful glove and to embark on a project advertising campaign. The District Court in a memorandum decision dated October 14, 1975, stated:

"We also disagree with Mrs. Gilbert that ' the question is not whether every part of her idea was new but whether the idea as a package was valuable to

Stanton and whether he acted upon it.' (Memorandum at p.24) As stated in our earlier opinion, the words of the contract itself reveal that Stanton bargained for an idea that 'solely'... originated with [Mrs. Gilbert] .' (Ex.1) Therefore, even if Mrs. Gilbert 'sparked' Stanton to begin manufacturing the Hands Beautiful glove and to embark on a major advertising campaign, Mrs. Gilbert cannot recover for the value of the idea itself because Stanton already knew of and had begun work on a glove made of lycra spandex which could be advertised as having therapeutic effects. The cases which plaintiff cites are inapposite because the contracts in those situations, unlike the one in the present case, did not expressly require that the idea originate 'solely' with the plaintiff. "

The trial on damages was held on September 3, 1975. In its decision on damages, the District Court stated that its former conclusion that "plaintiff was entitled to recover on a quantum meruit basis for the services which she performed and which were accepted by Aris " was based upon its finding that Stanton periodically discussed the glove with the Gilberts, sought their comments, kept them informed, showed them samples, discussed advertising ideas with the Gilberts, requested and received advice from the Gilberts with regard to proposed advertising and packaging plans, that the Gilberts attended press parties to stir up enthusiasm, and suggested names for the gloves (27a-28a). Plaintiff presented three expert witnesses who testified that the proper criterion for measuring damages was a royalty in the form of a percentage of Aris' gross sales, ranging from 5% to 10%. The defendant's

witness testified that he believed plaintiff should receive an hourly fee at the rate of \$10.00 per hour. The Court refused to accept the view of plaintiff's experts, although they were "undeniably qualified in their fields" (29a) since, so the District Court found, they assumed that Mrs. Gilbert was "a major, if not the primary engineer behind the development of the glove itself and the advertising and promotional campaigns undertaken in connection with the sale of the glove." (29a) The Court also rejected the defendant's suggestion of an hourly charge, on the ground that the hypothetical presented to that witness "failed to mention an important aspect of the advice which Mrs. Gilbert was found by the Court to have given to Stanton:

"Her suggestion as to the design and fit of the gloves. It also omitted the fact that Mrs. Gilbert made herself available to give such advice whenever Stanton requested it." (32a)

The District Court further held that compensation on an hourly basis "seems inappropriate in the circumstances of the case", and that an award of damages "on a project basis (i.e., without regard of time spent) seems appropriate for several reasons." (32a) The District Court further held:

"Mrs. Gilbert participated in the development and promotion of the Hands Beautiful glove for a period of over a year. During that time, her services were not rendered on any regular time schedule. She met

Stanton at dinner, after work or on weekends. No evidence was presented which suggested that she kept any record of the amount of time she spent in connection with the project and there is no reason to believe that she would or should have. Stanton continually told her that he would be 'fair' to her with regard to compensation and, for this reason as well as the wording of her agreement with Aris, she naturally anticipated that she would receive remuneration based on the successful sale of the gloves. Furthermore, there is no evidence that Stanton requested her to keep time records, that he considered the actual amount of time she spent on the project significant, or that Aris normally paid consultants on the basis of an hourly fee.

In fact, when Aris, by Stanton, did hire outside consultants to work on aspects of the gloves' production, they were not paid on an hourly basis. Once such consultant, Harvey Chandler, was hired on a monthly fee of \$435. to do marketing and advertising work, including contact with the media and other consultants. (Transcript, 156) Chandler had two or three people working with him on the Hands Beautiful account, but Chandler's fee was unrelated to the time he or any of them spent on the project. (Transcript, 157) A second consultant, Warren Verrow, was also paid a monthly fee, in his case, \$500. per month. (Transcript, 159) These arrangements, as well as a third, made with a consultant in connection with work done on other products and which was not tied to the amount of time spent, (Transcript, 163) demonstrate that Aris was more concerned with the quality of the work produced than the number of hours expended, and constitute a fair and reasonable structure for awarding damages to Mrs. Gilbert.

There remains for determination the precise amount to which Mrs. Gilbert is entitled as a project fee. In this connection a comparison of the work done by Chandler with that done by Mrs. Gilbert is appropriate. The letters and memos which Chandler sent to Stanton establish that Chandler was responsible for conceiving and developing packaging materials and promotional items. Mrs. Gilbert was never placed in charge of conceiving such items, but rather was normally called upon to comment upon ideas which others had presented. However, unlike Chandler or the other outside consultants whom Stanton hired, the advice which Mrs. Gilbert gave

to Stanton was not restricted to promotion and advertising matters, but related to every aspect of the glove's development , including some problems with the material used to produce the glove and design of the product. Indeed Mrs. Gilbert was like a general consultant who gave advice in varied areas including specific areas in which Stanton had hired other outside consultants. Moreover, Stanton relied upon Mrs. Gilbert to be available for comment and advice whenever he desired. The evidence on the liability at trial established that Stanton relied on Mrs. Gilbert to work until the project was complete. The at hand availability of Mrs. Gilbert's advice was clearly a significant part of her value to Aris.

We conclude that, on the basis of the quality of her work, the consistency with which it was rendered, and a comparison of project fees paid by Aris to other outside consultants whose work was similar to, but not as broad in scope as Mrs. Gilbert's, an award of \$12,000 would fairly and reasonably compensate her for the services which she rendered, and that the defendant is liable to her in that amount with interest at the legal rate per annum from September 18, 1969, the date on which her services terminated. (Transcript of liability trial, 452) "

POINT I

HAVING CONCLUDED THAT PLAINTIFF IS
NOT ENTITLED TO RECOVER UNDER THE
WRITTEN CONTRACT, THE COURT'S GRANT-
ING OF RELIEF IN QUANTUM MERUIT WAS
PROPER

Having determined that the written contract is unenforceable, and having found that substantial services stemming from the contract were rendered by the plaintiff to the defendant at defendant's request and in the context of a situation in which plaintiff justifiably expected and understood that she was to be paid, the District Court correctly followed a long line of New York and Federal precedents by awarding a quantum meruit recovery to plaintiff. In Grattan v. Societa Azzioni Cotonificio Cantoni , 151 N.Y.S.2d 875 (1956) the Court dismissed plaintiff's pleaded claim under an expressed contract on the ground of unenforceability under the Statute of Frauds and concluded that the plaintiff could nonetheless recover in the same action in quantum meruit for services rendered, stating:

"It is settled law that where the complaint pleads a special contract which the plaintiff fails to establish on trial, the plaintiff is entitled in the same action to recover upon quantum meruit if he has in fact rendered services. Smith v. Kirkpatrick, supra, 305 N.Y. 66, 73, 111 N.E.2d 209, 213 ; Bialostok v. Wolfer, 191 Misc. 385, 77 N.Y.S. 2d 222, Froessel, J. ; McKeon v. Van Slyck , 223 N.Y. 392, 399 119 N.E. 851, 852 ; Sturtevant v. Fiss, Doerr & Carroll Horse Co., 173 App. Div. 614, 17 N.Y.S.2d 530 ; Sussdorff v. Schmidt, 55 N.Y. 319, 324 ; Lockhart v. Hamlin, 190 N.Y. 132, 137, 82 N.E. 1094, 1095 ; Baumann v. Manhattan Consumers' Brewing Co., 97 App. Div. 470, 89 N.Y.S. 1088.

* * * *

Even if the Amity and Cantoni commission claims as originally pleaded had not been amended and hence would be barred by the statute of frauds, Grattan could nevertheless recover in quantum meruit in the same action. Harmon v. Alfred Peats Co., 243 N.Y. 473, 154 N.E. 314; Parver v. Matthews-Kadetsky Co., 242 App. Div. 1, 273 N.Y.S. 44; Elsfelder v. Cournand, 270 App. Div. 162, 59 N.Y.S. 2d 34; Gibson v. Archer Productions, Inc., 281 App. Div. 661, 117 N.Y.S. 2d 498; Spring v. Moncrieff, 208 Misc. 671, 144 N.Y. S. 2d 664; Potter v. Emerol Mfg. Co., 275 App. Div. 265, 89 N.Y.S. 2d 68; Black v. Fisher, Sup., 145 N.Y.S. 2d 142; Editorials, New York Law Journal, Nov. 22, 1955, Dec. 28, 1955".

Likewise, in Bialostok v. Wolfer, 191 Misc. 385, 77 N.Y.S. 2d, 222, relied on by the District Court, Judge Froessel stated:

"The law is well settled that even where an action is brought upon a special contract of employment, and said special promise is not established, a recovery may be had upon quantum meruit where the evidence does in fact show the rendition of services under circumstances which imply an agreement to pay therefor."

Again in Rodger v. Emigrant Industrial Sav. Bank, 258 App. Div. 614, 615, 17 N.Y.S. 2d 530, 532, the Court stated:

"It has been the practice long established to plead in one count both the agreed compensation and the reasonable value of the services rendered; and recovery on the latter theory has been permitted even where only the agreed remuneration has been pleaded." (Emphasis added)

In its brief, defendant assumes that the judgment below can only be sustained if a pleading amendment is appropriate under Rule 15(b), Fed. R. Civ. P. That is not the case. The District Court properly granted

quantum meruit relief in light of Rule 54(c), Fed. R. Civ. P. which provides, in relevant part, as follows:

"... (E)very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. "

In Atwater v. North American Coal Corp. (CCA 2nd, 1940) 111 F.2d 125, 126, the court stated that this Rule required that an

"... after trial judgment must be given according to the right of the case, whether the correct legal theory has been presented or not, Rules 15(b) and 54 (c). "

In a situation such as is here presented, where the litigated issue of the giving of suggestions and advice by plaintiff over a period of time was so inextricably bound with the contractual theory pleaded by plaintiff, the Court properly granted quantum meruit relief without requiring an amendment. See McCulloch Motors Corp. v. Oregon Saw Chain Corp. (S. D. Cal. 1965) 245 F. Supp 851, 9 F. R. Serv. 2d 16,32, Case 2. The rendition of such a judgment did not violate procedural due process . Michael Del Balso, Inc. v. Carozza (App. D. C. 1943) 136 F. 2d 280.

The award was clearly proper under the Fed. R. of Civ. P., Rule 15(b). The record is clear that the parties litigated both by expressed and implied consent the question as to whether the parties expected, understood and agreed

that Mrs. Gilbert was to be compensated for business suggestions that she gave relative to the Hands Beautiful glove, as well as the question of the extent and value of the services rendered by Mrs. Gilbert. In such a situation, the rendering of a quantum meruit award to plaintiff was clearly proper. See e.g. Underwriters Salvage Co. of New York v. Davis & Shaw Furniture Co., (CA 10th, 1952) 198 F 2d 450, 17 Fr.Serv. 15b. 1, case 1 ; Hamill v. Maryland Cas.Co. (CA 10th, 1954) 209 F.2d 338. See also Annotation, Recovery on Quantum Meruit Where Only Express Contract is Pleaded 84 ALR 2d 1077. Moreover, the defendant is precluded from raising the issue regarding a difference between the theory of recovery alleged in the complaint and that upon which the award was made, in that it failed to raise that point at the trial level. See Hampton Roads Carriers v. Boston Ins. Co. (D. Md. 1957) 150 F. Supp. 338 , 339. At no time prior to this appeal did defendant make the argument upon which it now bases its appeal.

The contention of the defendant that it was " surprised " by the award is spurious. That the facts which form the basis for the Court's quantum meruit award were in issue is apparent both from the record of the trial and from the proposed findings of fact submitted by both parties prior to the commencement of the trial. Paragraph 29 of the defendant's proposed findings requests the Court to find that the glove and the promotional material were developed by Aris and independent consultants which it hired, other than Mrs. Gilbert. Paragraph 30 of defendant's proposed findings states

that any claims by Mrs. Gilbert of disclosures of promotional ideas in connection with the Hands Beautiful glove were not the " item " to be " manufactured " which is " covered by the alleged agreement and could not serve as a basis of recovery ". On the other hand, plaintiff's proposed findings of fact included, at Paragraph 21, a finding that Mrs. Gilbert participated in the development of the marketing and advertising campaign and in the design of the actual glove, that Stanton advised her of various problems in the use of the material, that Mrs. Gilbert made suggestions with respect to the length of the fingers and that Mrs. Gilbert made various other design suggestions on the features of the glove. Clearly these facts were in dispute.

Defendant now argues that the " consistent reassurances that he would be ' fair ' to Mrs. Gilbert " , which the Court found were made (20a), were directed solely to the disclosure which the defendant contends was made on March 30th in connection with the night mitten, which defendant says was that of flattening the veins on the back of the hand (Defendant's brief, pp.16-17). As has previously been pointed out, however, the Court did not accept Stanton's version of the idea Mrs. Gilbert gave to him on that date. Clearly, the Court was correct in concluding that Stanton's consistent reassurances that he would be " fair " to Mrs. Gilbert was evidence of Stanton's willingness to pay for Mrs. Gilbert's services (20a).

Certainly it cannot be said that such conclusion was clearly erroneous.

Defendant claims that it was substantially prejudiced by the granting of relief in quantum meruit where the complaint pleaded an express contract. However, defendant has not shown that it did not have a fair opportunity to defend. Nor has it shown that it could offer any additional evidence of significance if the case were to be retried on the quantum meruit theory. The only suggestion in this regard is made on Page #13 of defendant's brief in which it acknowledges that Stanton " repeatedly testified that he had promised to be fair with Mrs. Gilbert " but argues that:

"... he was never asked (because defendant was not aware it was an issue) whether he ever offered or intended to pay for so-called ' advisory services ' after March 30. "

Certainly any question put to Mr. Stanton as to whether he " intended " to pay for such services would be improper, as calling for a conclusory characterization of his then state of mind. Moreover, as to a question as to whether he ever offered to pay for those services after March 30th, even if one were to assume that his answer was that he made no such offer, this clearly would not have changed the result. Stanton did testify as to one offer he made to plaintiff (Tr. L. 207-212). The Court's conclusion that Mrs. Gilbert's " continual advice to Stanton throughout the development and promotion of the glove " , was advice which Stanton solicited and often

used and which the Court further found was given " in clear reliance on Stanton's promise of March 30th to compensate her " (22a) was based on substantial and extensive testimony. The District Court's conclusion that Stanton:

"... solicited her services and suggestions in circumstances in which she had a right to rely on the expectation of being paid. "(22a)

would clearly not have been altered by any self-serving statement made by Stanton as to his then intention. Indeed, the District Court bolstered its conclusion by pointing out:

"That as of March 30, 1968 Mrs. Gilbert was no longer willing to give Stanton business suggestions for nothing is evident from her refusal to divulge her idea without a written agreement, "920a)

Stanton acknowledged that Mrs. Gilbert refused to give him her ideas on March 30th unless he agreed to pay for them(Tr. L. 265). He also acknowledged that she had previously given him glove ideas, some of which he adopted, but that he never had paid her for them (Tr. L. 298). Plaintiff testified that Stanton was always asking for ideas, which she gave him(Tr. L. 378-383) but that she refused to give him her ideas regarding the Hands Beautiful glove unless he agreed to pay for them (Tr. L. 389-390).

Moreover, defendant had sufficient opportunity to bring any evidence it wished to bear upon the question of the value of the services, in that the trial ^{DAMAGES} on ~~liability~~ was held approximately four months after the Court's decision that defendant was liable for the value of those services. Indeed,

when plaintiff's attorney sought to limit the defendant in its proof at the hearing on damages, the Court made it perfectly clear that the defendant had the opportunity at that hearing to bring out whatever facts it desired with regard to the alleged services rendered by plaintiff. The Court stated:

"I think it is in the interest of justice to bring out as much information as possible here. You (plaintiff's attorney) may argue later and I may be persuaded by the argument that Mr. Stanton did not say this the first time around, but that does not mean that I cannot listen to it now". (222a-223a)

Accordingly, it should be clear that the argument now raised by the defendant for the first time, i.e., that he did not have a fair opportunity to present a defense to the claim on a quantum meruit theory, is without substance. The facts found by the District Court which formed the basis of the Court's award were hotly contested, the defendant never requested from the District Court the opportunity which it now claims the District Court deprived it of, and the support in the record for the facts found by the Court below is so strong that defendant cannot in good faith claim that it sustained any prejudice.

POINT II

THE AMOUNT OF THE AWARD WAS INADEQUATE AND SHOULD NOT BE REDUCED.

There is no merit whatsoever to the defendant's claim that the amount of the award " is contrary to the record and insufficiently explained. " The \$12,000 award made by the Court was inadequate. It was certainly not excessive. At any rate it certainly cannot be shown by defendant that the awarding of that amount to the plaintiff was clearly erroneous. The record reflects substantial services rendered by Mrs. Gilbert over a period of 18 months, including the following:

During the period that Aris was developing promotional materials Stanton discussed the advertising ideas with Mrs. Gilbert (Tr. L. 45, 46, 169), obtaining her reaction to proposed advertising and packaging plans (Tr. L. 69, 139, 166, 167). During the period of experimentation, Stanton periodically discussed the glove with the Gilberts, sought their comments about its design (Tr. L. 47, 48, 49, 96, 99, 425) and kept them informed about the product's progress (Tr. L. 38, 532-3). As the District Court concluded, plaintiff gave Stanton " continual advice ... throughout the development and promotion of the glove, advice which Stanton solicited and often used, and which was given by Mrs. Gilbert in clear reliance on Stanton's March 30th promise to compensate her". (22a) The evidence reflects that Mrs. Gilbert advised Stanton that fabric samples which had been sent to her for her opinion were too thin

and would not make a proper glove, because the fabric did not have enough body to it and did not create the massaging action in the hand, since they were lacking in firmness and strength (Tr. L. 397-424) ; that before advertisements were prepared, Stanton discussed with Mrs. Gilbert specific material which was to go into them and the terminology to be used (Tr. L. 45) ; that Stanton sent numerous glove samples to Mrs. Gilbert during the development stage, asking her opinion about them (Tr. L. 47-48, 70, Exhibits 30-47) ; and that among other things, Mrs. Gilbert criticized and made suggestions regarding the way the thumbs were cut and the length of the fingers, some of which suggestions were incorporated into the glove (Tr. L. 48-50, 427) ;^{***} that a number of initial glove samples that were made were sent to Mrs. Gilbert by Stanton and discussed with her (Tr. L. 95-99, 102) ; that the development of the glove and the advertising campaign was discussed with the (Gilberts) at various dinners that they had together (Tr. L. 104) ; that a significant problem in the early manufacturing stage was that the fabric curled and was difficult to sew, a problem which was discussed with Mrs. Gilbert (Tr. L. 111-112), Stanton having asked her how to eliminate that problem (Tr. L. 113 Tr. D. 27-32)^{*} , that with respect to the curl problem Mrs. Gilbert suggested that the fabric be starched, a suggestion which Stanton utilized (Tr. L. 430), that Stanton had asked Mrs. Gilbert to suggest names

* Parenthetical numerical references preceded by "Tr. D" are to pages of the transcript of the hearing on damages.

** Defendant's attorney claims in a footnote at p. 20 of its brief that Stanton's denial that Mrs. Gilbert's suggestions were utilized was inadvertently omitted from the transcript. Plaintiff's attorney disagrees.

for the gloves (Tr.L.123), that various writings were prepared by Mr. Gilbert, Mrs. Gilbert's husband, in which the advertising ideas were set down (writings contained in Exhibits 52-77), some of which documents were discussed by Stanton with Mrs. Gilbert (Tr.L.137-138,149-150), both at dinner and at Stanton's office ; that some of the ideas in those writings emanated from Mrs. Gilbert (Tr.L.156,435) ; that Stanton discussed such details with Mrs. Gilbert as the tissue paper to be used in the packaging (Tr.L.166), that at times Stanton was having dinner with Mrs. Gilbert as often as once a week and discussed the glove project with her at those dinners (Tr.L.168-9) ; that Mrs. Gilbert gave advice with regard to the packaging of the glove (Tr.L.447-8) ; that Mrs. Gilbert suggested the names Hands Beautiful and Isotoner, both of which were utilized in the advertising and marketing campaign (Tr.L.449-52) ; that Mrs. Gilbert participated at Stanton's invitation in a debut party at the Rainbow Room in Rockefeller Center (Tr.L.214) and at the luncheon for glove buyers at the Plaza Hotel, at which the glove was introduced (Tr.L.215).

The contention of defendant's attorney that the amount of the award was " insufficiently explained " and that the decision does not contain sufficient citations to the record with respect to certain services rendered by Mrs. Gilbert is a meritless argument. Indeed, during the hearing on damages, the District Court pointed out that its opinion was not intended

to specify every service rendered by Mrs. Gilbert. The Court stated:

" It is impossible for me without having written a voluminous opinion that I do not think was required of me, to try to specify every item on which she made a contribution. The fact (is) that I did not do so." (221a)

Defendant's attorneys, in its brief, would completely disregard the opinions of the three experts who testified on behalf of plaintiff at the hearing on damages, claiming that " the testimony of plaintiff's witnesses assumed that the compensation of plaintiff should be predicated on her services as the supposed originator of the glove ... " To the contrary, the record reflects that the Court made a special point of telling the plaintiff's experts that Mrs. Gilbert was not the originator of the glove. For instance, the Court advised all of the experts including Dr. Jules Backman, a professor at N. Y. University, who the Court acknowledged " is a highly reputed economist and has had particular experience in marketing " , that

"I want to advise you that you must consider as a part of the hypothetical question the Court's previous finding in this case that Mrs. Gilbert's suggestion for a lycra spandex glove was not novel to the defendant in this case. Not only had the president of the company been aware of lycra spandex's possible use in gloves as a result of his dealing with others in the mid 1960's, but prior to March 30, 1968 he had actually received from a business acquaintance a glove sample of the very type of lycra spandex used in the Hands Beautiful glove. The development process of the glove was under way by the time Mrs. Gilbert revealed her idea as to lycra spandex. " (Tr.D. 48)

All three of the expert witnesses who testified on behalf of plaintiff were acknowledged by the Court to be "undeniably qualified"(29a). However, the Court refused to adopt their suggestions that fair compensation would have included amounts ranging from 5% -10% of the defendant's gross sales which at that point had amounted to \$17,000,000.00 , the Court having found that those witnesses erroneously assumed " that Mrs. Gilbert was a major if not the primary engineer behind the development of the glove itself and the advertising and promotional campaign ... " . Rather, one of the experts testified that his assumption was that Mrs. Gilbert had made " a rather substantial contribution" (Tr.D.58).

The three experts who testified on behalf of plaintiff were highly successful men in their fields, while the witness who testified for defendant was simply an employee, but not an officer of an advertising agency. The limited freelance and consulting work he did was while he was "moonlighting" and working for advertising agencies (Tr.D.171-172). Further, as the District Court pointed out, the hypothetical question put to him was extremely limited in describing the services of Mrs. Gilbert (Tr.D.182,31a).

Further, the claim is made that Mr. Chandler did substantially all of the work in developing the advertising and promotional material for Aris. However, a review of Exhibits 5-13 (the advertising and promotional material) reflects that virtually all of the material therein had been previously developed

by Mrs. Gilbert along with her husband who wrote out all of the advertising material and gave it to Stanton (See Exhibits 52-77, Tr. L. 431-434, 525-545).

Clearly, in light of the record, and in light of the remarkable success of the product, the award of \$12,000.00 is certainly not clearly erroneous. Indeed, the rendering of such an award did little to remedy a situation which prompted the District Court to say that

"Stanton's conduct toward Mrs. Gilbert
may not have been the most honorable ..."

CONCLUSION

For the reasons stated, the judgment in favor of plaintiff should be affirmed.

Respectfully submitted,

PHILIP HANDELMAN
Attorney for Plaintiff -
Appellant - Cross Appellee

Of Counsel:-

ROBERT M. TRIEN

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Brief

IS HEREBY ADMITTED

THIS 17 DAY OF Nov 1976

Mercer L. Stoddell
(per)

attorney(s) for